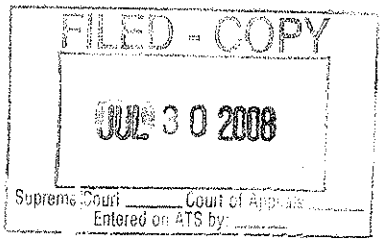
7-30-2008

Idaho Counties Risk Management Underwriters v. Northland Ins. Companies Respondent's Brief Dckt. 34375

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Appellant, vs. NORTHLAND INSURANCE COMPANIES, Respondent.	Supreme Court Docket No. 34375 Ada County District Case No. CVOC 0617112



RESPONDENT'S BRIEF

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA, HONORABLE DARLA WILLIAMSON, DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of Case.

Appellant Idaho Counties Risk Management Program Underwriters ("ICRMP") does not provide a summary of the nature of the case; accordingly, appellant Northland Insurance Companies (whose proper name and identity herein is Northfield Insurance Company)(hereinafter "Northfield") provides such in accord with I.A.R. 12(b)(3).

This case involves a claim by ICRMP against a reimbursement insurance policy issued to it by Northfield for coverage for the defense and settlement of a civil rights action filed by Donald Paradis against Kootenai County and its agents arising from the alleged wrongful incarceration of Mr. Paradis for murder some 26+ years ago. ICRMP defended and settled Mr. Paradis' suit under the policy it issued to Kootenai County, and, in turn, made claim against the Northfield policy. Northfield denied coverage on various grounds, including that the claim did not arise from an occurrence which took place during the applicable period of the Northfield policy, that Northfield's policy does not cover the defense costs incurred by ICRMP, and that the claims settled by ICRMP do not implicate coverage under the Northfield policy. Northfield prevailed on summary judgment.

B. Course of Proceedings.

Northfield agrees with ICRMP's summary of the course of proceedings in this matter.

C. Concise Statement of the Facts.

ICRMP's statement of facts do not fully and adequately state the facts established by the District Court nor the facts presented by Northfield, both of which are presented in this supplemental statement of facts.

In granting summary judgment to Northfield, the Court found the following facts:

This case arises out of an insurance coverage dispute. The central controversy arises from a lawsuit filed in Federal Court by Donald M. Paradis against various Idaho Counties Risk Management Program Underwriters ("ICRMP") insureds, including Kootenai County, and other individuals. During the relevant periods, ICRMP purchased what it is calling reinsurance from Defendant Northland[1] ("Northland"). ICRMP defended its insureds in the *Paradis* lawsuit under a reservation of rights. Northland has denied coverage, taking the position that the Northland policy does not cover the occurrence in question.

ICRMP was created in 1985 and sold insurance to its member insureds. During that period ICRMP purchased what it describes as "reinsurance"[2] from Northland.[3] In 2003, Donald Paradis filed a complaint in the Federal District Court for the District of Idaho alleging, *inter alia,* false arrest, false imprisonment, detention, and negligence, all of which were alleged violations of his federally protected civil rights and state law. Following the filing of the *Paradis* Complaint, Kootenai County forwarded the Complaint to ICRMP for its review and determination on a duty to defend. Upon review of the Complaint, ICRMP determined that based on the facts and legal theories alleged there was a legal duty to defend on the claims of negligent and intentional inflictions of emotional distress and failure to train. The duty to defend was held with a reservation of rights which was forwarded to Northland.

After ICRMP undertook the defense of the *Paradis* litigation, motions to dismiss were filed and granted in part in that case. The Court therein declined, however, to dismiss the constitutional claims and the state law claims which were based upon continuing torts. Soon thereafter, Mr. Paradis filed an amended complaint clarifying the legal theories and factual allegations against ICRMP insureds. ICRMP's determination that it had a duty to defend did not change.[4]

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[1]Northland Insurance Company is also identified as Northfield Insurance Company. For purposes of this motion, the Court will use Northland to reference both in keeping with the symmetry of the pleading caption.

[2]ICRMP describes the supplemental insurance as reinsurance while Northland would characterize the insurance policy as reimbursement insurance.

[3]ICRMP argues that this insurance was purchased from its inception while Northland argues that company records indicate that policies were issued to ICRMP for 1986-1988 and 1994-2001.

[4]ICRMP found that a duty to defend resulted only on three of the surviving claims, Count I (§ 1983: Failure to Train re: *Brady*) against Kootenai County; Count X(1) (Negligent Infliction of Emotional Distress) against Haws; and Count X(2) (Intentional Infliction of Emotional Distress) against Haws. These are the only Counts considered by the Court.

(R. 191-92.) However, given the complexity of the underlying matter and allegations relevant thereto, Northfield identifies the following as facts salient to the matter at hand:

The Palmer murder and Paradis criminal action.

1. On June 22, 1980, the bodies of Kimberly Palmer and Scott Currier were found in the woods outside of Post Falls, Idaho. (R. 220, Exh. 11, Counsel Aff., Exh. A, ¶4; Exh. B, p.19.)

2. Following retrieval by Kootenai County law enforcement authorities, Mr. Currier and Ms. Palmer's bodies were transported to Portland, Oregon, for autopsy that same day, and autopsies were performed on June 23, 1980 by the Chief Medical Examiner for the State of Oregon, William Brady, M.D. The autopsies were also observed by detective George Elliott of the Kootenai County Sheriff's Department (*Id.* at Exh. A, ¶5 & 10; Exh. B, p. 19.)

3. The following day, June 24, 1980, a meeting was held among a number of individuals from the Spokane County Sheriff's Office and the Kootenai County Sheriff's Office to discuss the investigation of the killings. Also in attendance was Kootenai County Deputy Prosecuting Attorney D. Marc Haws. (*Id.* ¶10 & 11; Exh. B, p. 20.) At the time, the Prosecuting Attorney for the county of Kootenai was Glen Walker. (*Id.* at ¶1.) During the course of the meeting, Mr. Haws took notes which reflected his understanding of the murders of Mr. Currier and Ms. Palmer at that time, as well as some of the discussions had among the individuals attending the meeting ("the Haws notes"). (*Id.* at ¶12; Exh. B, p.20; Exh. DD, ll. 60:6-64:1.)

4. Also on June 24, 1980, Paradis and two other individuals, Tom Gibson and a Mr. Amacher, were charged with the murder of Currier and Palmer in Washington, and Paradis was arrested and taken into custody in Washington. (*Id.*, Exh. B, p. 21.) At some time thereafter, Washington and Idaho prosecutors agreed that Currier's murder would first be tried in Washington, and no action would be taken in trying the Palmer murder. (*Id.*; Exh. HH, ll. 254:17-256:9.)

5. Thereafter, on June 25, 1980, Mr. Haws represented the State at a probable cause hearing, seeking first degree murder charges against Donald Paradis, Tom Gibson and Larry Evans for the murder of Kimberly Palmer in Idaho. (*Id.*, Exh. A, at ¶20; Exh. B, p.21.) At this hearing, Mr. Elliott provided testimony regarding the investigation, having previously executed the affidavit in support of the complaints for the arrest warrants for Paradis, Gibson, and Evans. (*Id.* Exh. A, ¶2; Exh. B, p. 21.)

6. In September 1980, Mr. Paradis was tried (jointly with Mr. Gibson) and acquitted of the murder of Mr. Currier in Washington; Mr. Haws attended this trial. (*Id.*, Exh. B, p. 22; Exh. HH, ll. 257:2-11.) After the acquittal, Kootenai County sought arrest warrants for Mr. Paradis (as well as Mr. Gibson) for the murder of Ms. Palmer. (*Id.*, Exh. B, p. 22.)

7. On November 26, 1980, Mr. Paradis was arrested and made his initial appearance in an Idaho court on the charge of murder of Kimberly Palmer. (*Id.*, Exh. B, p. 22; Exh. HH, ll. 227:7-10.)

8. On December 8-12, 1980, Mr. Paradis' preliminary hearing was conducted by Kootenai County Deputy Prosecuting Attorney Peter Erbland. (*Id.*, Exh. A, §31; Exh. B, p. 22.)

9. In April 1981, a bail hearing was conducted for Mr. Paradis, wherein a 'aspiration of water' theory was first presented by the State. (*Id.*, Exh. B, p. 22.) Specifically, Dr. Brady had previously opined in June or July of 1980 to Haws (who possibly conveyed that information to Elliott and Erbland) that Ms. Palmer had aspirated water from the creek near Post Falls in which her body had been found partially submerged, suggesting that she had been alive when she went into the creek and, consequently, was killed in Idaho. (*Id.* at p. 21); Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997). The Ninth Circuit noted in commenting on the theory:

> The location of Palmer's death was crucial in more than one respect. The theory of Paradis' defense was that Currier and Palmer were both killed by others at Paradis' house in Spokane at a time when Paradis was not present. Indeed, Paradis had been tried and acquitted in Washington for the murder of Currier. If Palmer was

> killed at the creek in Idaho, however, then Paradis was almost certainly involved in her murder rather than merely in the disposal of her body. Location of the murder in Idaho was also essential to the Idaho court's jurisdiction.

130 F.3d at 392.

10. On December 10, 1981, following trial conducted by Mr. Haws and Mr. Erbland, as the Kootenai County lead prosecutors on the case, Donald Paradis was found guilty of first-degree murder in Idaho, and was sentenced to death. (*Id.*, Exh. A, §31; Exh. B, p. 23, 50, 63); Paradis v. State, 110 Idaho 534, 716 P.2d 1306 (1986). During the trial, Dr. Brady testified that Ms. Palmer had inhaled water at the Idaho crime scene. (*Id.*, Exh. B, at p. 23.)

11. Mr. Walker left office as Kootenai County Prosecuting Attorney in 1988. (R. 220, Exh. 11, Counsel Aff., Exh. EE, at ll. 56:5-24.)

12. Mr. Haws left the employment of Kootenai County in 1983. (*Id.*, Exh. DD, at ll. 121:5-7.)

13. Mr. Erbland left the employment of Kootenai County in 1987. (*Id.*, Exh. FF, at ll. 10:6-8.)

14. Mr. Elliott retired in 1988. (*Id.*, Exh. GG, at ll. 8:8-13.)

15. Mr. Paradis subsequently sought review of his conviction by appeal, post-conviction relief, and habeas corpus in Idaho state court and the United States District Court for the District of Idaho; these various petitions were denied. *See* State v. Paradis, 106 Idaho 117, 676 P.2d 31 (1983); Paradis v. State, 110 Idaho 534, 716 P.2d 1306 (1986); Paradis v. Arave, 667 F. Supp. 1361 (D. Idaho 1987), *aff'd in part, rev'd in part by* 954 F.2d 1483 (9th Cir. 1992), *aff'd on remand by* 20 F.3d 950 (9th Cir. 1994), *cert. denied*, 513 U.S. 1117, 115 S. Ct. 915, 130 L.Ed.2d 796 (1995).

16. Mr. Paradis again sought habeas relief in 1995. While this habeas petition was pending in January 1996, Paradis' counsel obtained for the first time copies of the Haws notes

from the attorney representing Tom Gibson. Gibson's attorney had obtained the notes through subpoenas of Kootenai County during Gibson's post conviction relief efforts. Paradis v. Arave, 130 F.3d at 393-4. The Haws notes, in substance, showed significant inconsistencies in Dr. Brady's opinion the day after the autopsy as to the cause and location of death, and Dr. Brady's opinions at trial. *Id.* at 394-5. While Paradis was awaiting trial in Kootenai County in 1980-81, Paradis' attorney had made a routine request for disclosure pursuant to ICR 16, but the prosecutor did not reveal the notes or any of the potentially exculpatory information in or related to them. *Id.* at 394. In 1987, Paradis had also sought a subpoena of documents from the Kootenai County Prosecutor's office during the course of his first federal habeas petition, but the subpoena was quashed. *Id.* The Ninth Circuit examined the significance of the Haws notes and the exculpatory evidence to Paradis' criminal trial, and held that a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), requiring the Kootenai County prosecutors to disclose exculpatory evidence, more likely than not occurred prior to Paradis' trial for the murder in Idaho of Kimberly Palmer. *Id.* at 395. The Ninth Circuit remanded Paradis' habeas corpus proceeding to the district court for a further evidentiary hearing. *Id.* at 400.

17. On May 17, 1996, Mr. Paradis was granted clemency by the Governor of Idaho, who commuted his sentence to life without parole. Paradis v. Arave, 130 F.3d 385, 389 (9th Cir. 1997).

18. On remand from the Ninth Circuit, the district court granted the habeas petition on March 14, 2000, and ordered the State, within 120 days, to initiate new trial proceedings against Mr. Paradis or release him, which ruling was affirmed by the Ninth Circuit on March 5, 2001. Paradis v. Arave, 2000 WL 307458 (D. Idaho 2000), *aff'd by* Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001).

19. Mr. Paradis pled to a lesser charge of accessory to a felony, and was released on April 10, 2001. (R. 220, Exh. 11, Counsel Aff., Exh. C, at Exhibit D; Exh. HH, ll. 319:20-24.)

The Paradis *lawsuit against Kootenai County, et al.*

20. Following Mr. Paradis' release from custody, he filed a Notice of Tort Claim with Kootenai County on October 9, 2001. (*Id.*, Exh. D, at ¶17.)

21. On April 9, 2003, Mr. Paradis filed his Complaint in the U.S. District Court for the District of Idaho, naming William Brady, Kootenai County, Glen Walker, D. Marc Haws, Peter Erbland, and George Elliott as defendants. (*Id.*, Exh. E.) Plaintiff's initial Complaint included several claims predicated on the withholding of evidence by the defendants:

- Under Count One, Mr. Paradis asserted civil rights claims under the Fourth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and a violation of the Idaho Constitution, against defendants Kootenai County and Walker, for failing to train and supervise with respect to *Brady* requirements. Specifically, Mr. Paradis alleged that "[b]y 1980 and 1981," the law governing *Brady* had been clearly established (¶62), and that "[a]t the times of the Currier and Palmer homicide investigations, Plaintiff's arrest, and continuing through the prosecution of Paradis without interruption," Kootenai County and Walker knew or should have known that their employees would be faced with circumstances requiring *Brady* disclosures, thereby necessitating specific training on that point (¶¶64 & 69).

- Under Count Two, Mr. Paradis asserted civil rights claims under the Fourth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and a violation of the Idaho Constitution, against defendants Kootenai County and Walker, for failing to train and supervise with respect to prosecutions lacking probable cause. Specifically, Mr. Paradis alleged that "[a]t the time Paradis was arrested and charged by Kootenai County," he had a clearly established right to not be arrested and prosecuted without probable cause (¶73), and that "[i]n 1980 and 1981," Kootenai County and Walker knew or should have known that their employees would be faced with cases where probable cause was lacking, thereby necessitating specific training on that point (¶74);

- Under Counts Four, Five and Six, Mr. Paradis asserted claims for negligence, false arrest, malicious prosecution, false imprisonment, and violations of Idaho criminal statutes, against defendants Walker, Haws, Erbland, and Elliott. Specifically, Mr. Paradis alleged three primary arguments: first, with respect to the arrest warrant obtained in 1980 (¶41), that "[a]lthough warrants were sought and obtained by these Defendants for the arrest, detention, restraint and incarceration of Paradis," such warrants were "obtained by deceit, through the

intentional, deliberate and malicious withholding of material, exculpatory evidence . . . and through the presentation of information which was either knowingly false or fraught with a reckless disregard for the truth and accuracy of such information" (¶83); second, with respect to the December 1980 preliminary hearing and related pre-trial motion to dismiss (¶43), that "[a]t the time of the Plaintiff's preliminary hearing, and subsequently at the Idaho district court judge's reconsideration of the magistrate's probable cause determination on Plaintiff's motion to dismiss, there was a further intentional, deliberate and malicious withholding of material evidence by these Defendants and a representation of information and arguments ostensibly supporting probable cause which was completely without factual support" (¶84); and third, with respect to the December 1981 trial (¶¶54 & 57), that "[i]n prosecuting the first degree murder charge against Paradis, Haws intentionally concealed or recklessly withheld evidence which was exculpatory and impeaching and either suborned the perjurous testimony of Dr. Brady or deliberately elected not to report such perjury to the Court when it obviously occurred." (¶85).

- Under Count Six, Mr. Paradis asserted civil rights claims under the Fourth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and a violation of the Idaho Constitution, against defendants Haws, Elliott, and Brady, for conspiracy to present the aspirated-water argument. Specifically, Mr. Paradis alleged that prior to his November 1980 arrest, with respect to defendants Haws and Elliott, "[w]hen this conspiracy arose and was first acted upon, Haws and Elliott were performing purely investigatory functions which preceded the arrest and decision to prosecute Paradis" (¶92), and that Dr. Brady then adopted this conspiracy "into his ostensibly informed opinion testimony for purpose of the Gibson and Paradis trials" in June and December 1981 (¶¶47, 54, & 91);

- Under Count Seven, Mr. Paradis asserted negligent and intentional infliction of emotional distress claims against Dr. Brady in his capacity as a private citizen for "committing the conduct alleged in Count Six," relating to Dr. Brady's testimony in the Gibson and Paradis trials in June and December 1981 (¶¶47, 54, 91, & 98);

- Under Count Eight, Mr. Paradis asserted a defamation claim against Dr. Brady for statements related to the subjects of his testimony "[t]hroughout the numerous and various challenges to Plaintiff's conviction" (¶103); and

- Under Counts Nine, Ten and Eleven, Mr. Paradis asserted claims of negligence, intentional infliction of emotional distress, and defamation against defendant Haws, on two points: first, that, at the time of Paradis 1986 habeas proceedings(¶112), when "Haws was living in Salt Lake City, Utah [and] no longer employed as a prosecutor and was working for a private company" (¶113), he reviewed his prior file notes and continued to withhold them, making "a negligent, if not deliberate choice, of continued secrecy. . . inflicting severe emotional distress upon Paradis" (¶118); and second, that "[t]hroughout his involvement in the Paradis and Gibson cases, both when serving as a prosecutor and after" (¶120), Haws defamed Paradis in the media (¶¶121-122).

(*Id.*, Exh. E, at pp. 14-28; Exh. F, at pp. 4-6.)

22. Thereafter, the *Paradis* defendants filed a number of motions to dismiss, and on September 30, 2004, the court issued its Memorandum Decision and Order, dismissing a number of the claims made by Paradis, and permitting the filing of an amended complaint. (*Id.*, Exh. F, at pp. 77-80.)

23. On June 6, 2005, Mr. Paradis filed his First Amended Complaint and Demand for Jury Trial, which continued to identify William Brady, Kootenai County, Glen Walker, D. Marc Haws, Peter Erbland, and George Elliott as defendants. (*Id.*, Exh. D.) Mr. Paradis refined his claims, which were made as follows:

- Under Count I, Mr. Paradis alleged a claim under §1983 for failure to train re: *Brady* requirements against defendants Kootenai County and Walker. Specifically, Mr. Paradis alleged that "[b]y 1980 and 1981," the law governing *Brady* had been clearly established (¶91), such that by November 1980, "[a]t the time of Plaintiff's arrest, and continuing thereafter without interruption", Kootenai County and Walker knew or should have known that their employees would be faced with circumstances requiring *Brady* disclosures, thereby necessitating specific training on that point (¶¶91-95).

- Under Count II, Mr. Paradis alleged a claim under §1983 for failure to train re: probable cause against defendants Kootenai County and Walker. Specifically, Mr. Paradis alleged that "[a]t the time Plaintiff-Paradis was arrested and charged by Kootenai County," he had a clearly established right to not be arrested and prosecuted without probable cause (¶102), such that "[i]n 1980 and 1981," Kootenai County and Walker knew or should have known that their employees would be faced with cases where probable cause in potential cases was lacking, thereby necessitating specific training on that point (¶¶103 & 105);

- Under Count III, Mr. Paradis alleged a claim under §1983 for failure to train re: fabricated evidence against defendants Kootenai County and Walker. Specifically, Mr. Paradis alleged that "[a]t the time Plaintiff-Paradis was arrested and charged by Kootenai County," he had a clearly established right to not be seized, arrested or prosecuted through the use of fabricated evidence (¶112), such that "[i]n 1980 and 1981," Kootenai County and Walker knew or should have known that their employees might use fabricated evidence, thereby necessitating specific training on that point (¶¶113-115, & 118).

- Under Count IV, Mr. Paradis alleged a claim under §1983 for malicious prosecution against defendants Brady and Elliott, asserting that "[t]he named Defendants wrongfully caused the charges against Plaintiff-Paradis to be filed and wrongfully prosecuted," noting that "[t]he proceeding for the first degree murder of Kimberly Palmer against Plaintiff-Paradis was subsequently terminated in his favor some 20 years later." (¶¶123-124).

- Under Count V, Mr. Paradis alleged a claim under §1983 for pre-arrest conspiracy to fabricate jurisdiction and probable cause against all defendants. Specifically, Mr. Paradis alleged that, in reference to his November 26, 1980 arrest (¶59), "[p]re-arrest, knowing they did not possess, and could not lawfully obtain, evidence which provided proof beyond a reasonable doubt . . . the Defendants entered into a plan, design and conspiracy to concoct evidence against Plaintiff-Paradis as if fact[.]" (¶134). Further, Mr. Paradis alleged that Dr. Brady "then transposed the theory into his ostensibly informed opinion testimony for purpose for the Gibson and Plaintiff-Paradis trials" in June and December 1981 (¶¶71, 81 & 135), and, following Mr. Paradis' conviction, continued to conspire with other unidentified individuals (¶142).

- Under Count VI, Mr. Paradis alleged a claim under §1983 for false procurement of an arrest warrant against defendant Elliott. Specifically, Mr. Paradis alleged that Elliott, in seeking the arrest warrant for Paradis' November 26, 1980 arrest, "obtained by deceit, through the intentional, deliberate and malicious withholding of material, exculpatory evidence . . . and through the presentation of information by him which was either knowingly false or fraught with a reckless disregard for the truth and accuracy of such information" (¶146), and also that, with respect to the December 1980 preliminary hearing and related pre-trial motion to dismiss (¶66), that "[a]t the time of the Plaintiff's preliminary hearing, and subsequently at the Idaho district court judge's reconsideration of the magistrate's probable cause determination on Plaintiff's motion to dismiss, there was a further intentional, deliberate and malicious withholding of material evidence by Elliott and a representation of information and arguments ostensibly supporting probable cause which was completely without factual support" (¶147).

- Under Count VII, Mr. Paradis alleged a state law claim for negligent training and supervision against defendants Kootenai County and Walker, particularly incorporating "the allegations of Counts I, II and III", to assert that "[i]n the investigatory stages of the Palmer homicide, prior to the arrest of Plaintiff-Paradis and then continuing thereafter, Defendants-Walker and Kootenai County failed and neglected to reasonably supervise and exercise control over Haws, Erbland, Elliott and Brady" (¶156).

- Under Count VIII, Mr. Paradis alleged a state law claim for intentional infliction of emotional distress against defendant Brady, for conduct beginning with the investigatory phase of the case through Mr. Paradis' later release in April 2001 (¶160).

- Under Count IX, Mr. Paradis alleged a state law claim for false light invasion of privacy against defendants Brady and Haws, for statements related to the aspirated-water theory. As to Brady, Mr. Paradis alleged that Brady made statements "after the conviction of Plaintiff-Paradis, up to and including the time of his release upon habeas corpus" (¶171). With Haws, Paradis clarified that, with respect to Haws, "[t]he statements included, but were not limited to Haws' statements to the media after he was no longer a prosecutor to the effect that Plaintiff-Paradis was guilty of murdering Palmer," such that "[t]hese statements by Haws took place on or about 1986 and 1987 and continued after Plaintiff-Paradis' release from prison." (¶¶173-174).

- Under Count X, Mr. Paradis alleged a state law claim for negligent and intentional infliction of emotional distress against defendant Haws, based upon Haws' alleged statements regarding Paradis' guilt. While alleging that Haws made these statements "[d]uring the investigatory phase and after the conviction," (¶182), Paradis further alleged that, for acts occurring in the time period after his December 1981 conviction, "[d]uring the extensive post-conviction and habeas corpus proceedings involving Plaintiff-Paradis, Defendant Haws was a private citizen, that is, he was not a state actor." (¶187). Similarly, referring to Haws' alleged continued withholding of his notes following the subpoena issued in 1986 or 1987 for the habeas proceeding, Paradis alleged that Haws was "then a private attorney practicing in Salt Lake City, Utah[.]" (¶¶193-194).

- Under Count XI, Mr. Paradis alleged a claim under §1983 for conspiracy to withhold exculpatory evidence against defendants Elliott and Brady. Specifically, Mr. Paradis alleged that, in the time before his December 1981 trial, "Brady and Elliott conspired that Brady would not bring documents and tangible evidence to, or reveal documents and tangible evidence at, the trial of Plaintiff-Paradis, that would show that he was innocent of the crime with which he was charged." (¶200).

(*Id.*, Exh. B, at pp. 4-5; Exh. D, at pp. 17-41.)

24. Following another round of motions to dismiss, the *Paradis* court issued its Memorandum Order on March 31, 2006, dismissing a number of claims, as well as dismissing defendants Walker, Erbland, and Brady, thereby only leaving the following claims at issue in the litigation:

- Count I, Count II, Count III, and Count VII (the failure to train claims, *supra*, relating to the status of the law "[i]n 1980 and 1981" (¶¶91, 103, & 113) and the alleged failure to train county employees of such law "[a]t the time Plaintiff-Paradis was arrested and charged by Kootenai County" (¶¶93, 102, & 112)) against defendant Kootenai County, which were not addressed in the court's Memorandum Order;

- Count V against defendant Haws, §1983 conspiracy regarding the aspiration of water theory for the time period of late June or early July, 1980, and continuing through December 10, 1980;

- Count V against defendant Elliott, §1983 conspiracy regarding the aspiration of water theory for the time period of late June or early July, 1980, and continuing through December 10, 1980;

- Count X(1) against defendant Haws, negligent infliction of emotional distress claim for the time period of late June or early July, 1980, and continuing through December 10, 1980; and

- Count X(2) against defendant Haws, intentional infliction of emotional distress for the time period of late June or early July, 1980, and continuing through December 10, 1980.

(*Id.*, Exh. B, at pp. 5, 66.)

25. Thereafter, defendants Kootenai County, Haws and Elliott, through ICRMP as the insurer, agreed to settle the remaining claims of Paradis against them for $900,000, and a stipulation to dismiss was filed August 14, 2006. (*Id.*, Exhs. G & H.)

The ICRMP and Northfield Policies, and ICRMP's Complaint.

26. ICRMP was formed in 1985, and Kootenai County is a member thereof. (R. 8-9, Complaint at ¶¶VI & VII.)

27. During the course of that membership, but beginning in 1985, ICRMP issued to Kootenai County a number of insurance policies over the years, including a Public Entity Multi-Lines Insurance Policy, Policy No. 19A01028100100, with a policy period from October 1, 2000 to October 1, 2001 ("the ICRMP Policy"). (R. 220, Exh. 11, Counsel Aff., Exh. I.) This policy provided both Comprehensive General Liability coverage, as well as Errors & Omissions coverage . *Id.*

28. After Mr. Paradis filed his notice of tort claim against Kootenai County on October 9, 2001, the claim was forwarded to ICRMP. (*Id.*, Exh. J.)

29. Thereafter, following review of the claim under the ICRMP Policy, ICRMP denied the claim on November 20, 2001. (*Id.*, Exh. K.) In denying coverage, ICRMP's representative noted:

> The date of loss for this claim is June 24, 1980 (the date that Deputy Prosecutor Hawes learned of the exculpatory evidence and did not turn it over to Paradis's attorneys). This date could be stretched to the date of Paradis's conviction on the murder charge, which would have occurred in 1981, but that would still be well outside the retroactive date of the Policy.

Id. at 1.[1]

30. ICRMP later indicated to Kootenai County, on November 18, 2002, that it would reconsider the claim when Paradis filed a complaint. (*Id.*, Exh. L.)

31. Following the filing of the Paradis complaint on April 9, 2003, ICRMP accepted the defense under a reservation of rights as to defendants Kootenai County, Walker, Haws, Elliott, and Erbland by way of letter dated June 30, 2003. Defense was denied to defendant Brady, by way of letter dated June 12, 2003.[2] (R. 220, Exh. 9, Martens Aff., Exhs. B & C.)

32. In December 2005, following the filing of Paradis' First Amended Complaint, ICRMP advised the defendants that ICRMP would continue to provide a defense. (R. 220, Exh. 11, Counsel Aff., Exhs. M-Q.)

33. On December 29, 2005, a letter from Ms. McHenry directed to Kootenai County reflected that ICRMP considered only three of the claims in the First Amended Complaint to be covered: Count I ((§1983/Failure to Train re: *Brady*) against Kootenai County; Count X(1) (Negligent Infliction) against Haws; and Count X(2) (Intentional Infliction) against Haws.[3] (*Id.*,

---

[1] Although Northfield's 2000-2001 policy is at issue, note that this initial denial references ICRMP's policy "effective October 1, 2001," rather than ICRMP's 2000-2001 policy.

[2] Again, although Northfield's 2000-2001 policy is at issue, note that the denial of coverage to defendant Brady references ICRMP's policy "effective October 1, 2002," rather than ICRMP's 2000-2001 policy.

[3] Paradis' First Amended Complaint only contains a Count X; however, for the district court's

Exh. R.) The remainder of the claims in the First Amended Complaint "appear not to be covered by the ICRMP policy since the date of loss appears to be outside the County's policy periods." *Id.* The letter went on to state that "the County's prior carriers should be put on notice. As I understand from your conversation, those carriers, to your knowledge, have been put on notice, and you will provide that information to us as soon as possible." *Id.*

34. Northfield issued to ICRMP a Public Entity All Lines Aggregate Insurance Policy, Policy No. AA101263, policy period October 1, 2000 to October 2001 ("the Northfield Policy"). (R. 220, Exh. 9, Martens Aff., Exh. A.) This policy provided occurrence-based comprehensive general liability coverage (Section II), and claims-made errors & omissions coverage (Section IV), both of which in general obligated Northfield to indemnify ICRMP for loss and expenses incurred by ICRMP **on claims covered by the Northfield Policy**. *Id.* (Emphasis supplied.) Section II of the Northfield Policy provides two coverage components at issue in this litigation:

> A – COMPREHENSIVE GENERAL LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums, including expenses, all as more fully defined by the terms ultimate net loss, which the Assured shall become legally obligated to pay as damages imposed by law because of bodily injury, property damage, personal injury, advertising injury, products liability and or completed operations, host/liquor liability or incidental malpractice which result from an occurrence and which occur during the policy period.
>
> . . .
>
> C – LAW ENFORCEMENT LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of errors, omissions or negligent acts arising out of the performance of the Assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of Personal Injury, Bodily Injury, Property Damage, Violation

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analysis of intentional versus negligent infliction of emotional distress, the district court distinguished between the claims by renumbering them as "X(1)" and "X(2)."

> of Civil Rights or First Aid, happening during the period of this insurance except as covered under Section II A and B.

(*Id.*, Exh. A, at p. 13.)

35. Under the Northfield Policy, ICRMP defends all claims that may involve the Northfield Policy:

> It is understood that all claims under this policy shall be serviced by I.C.R.M.P.'s Claims Department who shall perform the following duties:
>
> A. Investigate and settle or defend all claims or losses – it is understood that, when so requested, the I.C.R.M.P. Claims Department will afford Underwriters any opportunity to be associated with them in the defense or control of any claim, suit or proceeding.

(*Id.*, Exh. A, at p. 5.)

36. Northfield's Policy does not impose on Northfield a duty to defend, but rather a duty to reimburse defense costs for those costs incurred that are covered by the Northfield policy. (*Id.*, Exh. A.) As set forth in paragraph 34, *supra*, coverage under the Comprehensive General Liability section provides for reimbursement of "Ultimate Net Loss" defined as:

> 17. ULTIMATE NET LOSS
>
> ...
>
> For Section II, the term "ultimate net loss" shall mean the total sum which the Assured becomes obligated to pay by reason of personal injury or property damage claims, either through adjudication or compromise, after making proper deductions for all recoveries and salvages.
>
> "Ultimate net loss" shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, expenses for doctors and nurses, also law costs, premiums on attachment of appeal bonds, expenses for lawyers and investigators and other persons for litigation, settlement, adjustment and investigation of claims or suits which are paid as a consequence of any occurrence covered hereunder.

(*Id.*, Exh. A, at p. 40.)

37. As defined under the General Definitions section, "occurrence" is:

For Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period. All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

(*Id.*, Exh. A, at p.6.)

38. Intentional acts are excluded from Section II coverage:

THIS SECTION DOES NOT APPLY – to any Claim for damages, whether direct or consequential, or for any cause of action which is covered under any other Section of this policy or

A. to personal injury or property damage which the Assured intended or expected or reasonably could have expected but this exclusion shall not apply to personal injury resulting from the use of reasonable force to protect persons or property.

(*Id.*, Exh. A, at p. 16.)

39. Under Section II of the Northfield Policy, "Personal Injury" is defined to include:

. . . Bodily Injury, Mental Anguish, Shock, Sickness, Disease, Disability, Wrongful Eviction, Malicious Prosecution, Discrimination, Humiliation, Invasion of Rights of Privacy, Libel, Slander or Defamation of Character; also Piracy and any Infringement of Copyright or of Property, Erroneous Service of Civil Papers, Assault and Battery, Disparagement of Property, False Arrest, False Imprisonment and Detention.

(*Id.*, Exh. A, at p. 14.)

40. Section IV of the Northfield policy is a claims-made section which provides, in relevant part that:

If during the Policy Period, any Claim is first made against the Assured for a Wrongful Act, Underwriters will indemnify the Assured, for all Loss incurred by the Assured by reason of any Wrongful Act as hereinafter defined.

. . .

C. The phrase "Claim first made" shall be understood to have happened when

1. the Assured or the service organization receive notice of suit or written request for services or damages or
2. the Assured and the service organization receive knowledge of an incident likely to give rise to a claim or

3. the service organization establishes an incident file, whichever first occurs.

(*Id.*, Exh. A, p. 21.)

41. Section IV of the Northfield policy excludes coverage for "any Claim for damages . . . I. arising out of law enforcement activities[.]" (*Id.*, Exh. A at p. 22.)

42. Section IV of the Northfield Policy excludes coverage for damages "brought about or contributed to by fraud, dishonesty or criminal act by any Assured[.]" (*Id.*, Exh. A at p. 22.)

43. The Specific Conditions section of Section IV provides:

> 1. LIMIT OF LIABILITY: Loss or losses arising out of the same Wrongful Act or series of continuous, repeated or interrelated Wrongful Acts giving rise to a claim or claims shall be construed as a single loss and only one self-insured retention amount shall apply thereto.

and further excludes claims "resulting from an occurrence which commences prior to the Retroactive Date set out in Declaration 4." (*Id.*, Exh. A at pp. 22-23.)

44. Under Endorsement No. 14, the following retroactive dates apply to Kootenai County for Section IV purposes:

> Kootenai County – November 29th, 1985 for the first $1,000,000 any one claim, December 31st, 1994 for the next $1,000,000 any one claim and October 1st, 2000 for the remaining $4,000,000 any one claim.

(*Id.*, Exh. A, Endorsement No. 14 (N00086).)

45. Policies issued by Northfield to ICRMP for other policy years – including AA1045, policy period approximately 1986-1988; AA101127, policy period December 31, 1994 to December 31, 1997; AA101188, policy period January 1, 1997 to October 1, 1998; AA101188B, policy period approximately 1998-1998; AA101226, policy period October 1, 1998 to October 1, 1999; AA101242, policy period October 1, 1999 to October 1, 2000 (as per Endorsement No. 36); and AA101242a, policy period approximately 1999-2000 – include or otherwise have the same coverage language as the 2000-2001 Northfield policy or reference

standard language from a standard policy form identified as PE-OCC. JAN 94, which is the form used by the 2000-2001 Northfield Policy. (*Id.*, ¶¶ 5-12.)

46. No "follow-form" language or provision is included in the Northfield Policy. (*Id.*, Exh. A.)

47. No "follow-the-fortunes" language or provision is included in the Northfield Policy. (*Id.*, Exh. A.)

48. ICRMP sought reimbursement from Northfield for defense costs paid by it during the defense of the *Paradis* action above ICRMP's self-insured retention. (R. 67-69.) Northfield denied ICRMP's request for reimbursement on the basis that Northfield's policy no. AA101263 did not provide coverage for such costs or any sum paid by ICRMP to settle the *Paradis* civil action against Kootenai County or the other defendants. (R.71.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Northfield does not identify any additional issues on appeal.

III. ATTORNEY FEES ON APPEAL

Northfield does not seek fees on appeal in this matter, but does request an award of costs should it prevail, pursuant to I.A.R. 40.

IV. ARGUMENT

A. ICRMP's Decision To Defend The Kootenai County Defendants Under Its Own Policy Does Not Trigger Coverage Under The Northfield Policy When No Coverage For The Occurrence Exists Under the Northfield Policy.

ICRMP's first assignment of error is the assertion that the District Court failed to hold that ICRMP could unilaterally decide whether or not coverage existed under the Northfield policy, as ICRMP was defending the *Paradis* action. In doing so, ICRMP argues that Northfield was barred from denying coverage under its own policy two years into the *Paradis* litigation. This argument misconstrues the policies at issue.

The District Court's decision, with respect to the reimbursement of defense costs, was reached through a two step process. First, the District Court correctly held that there was no occurrence during the Northfield policy (as discussed below). Second, the District Court held that, because there was no coverage triggered due to the absence of an occurrence, defined by the Northfield policy during its existence, Northfield did not have to "indemnify ... for all sums, including expenses ... which the Assured shall become *legally obligated to pay* as damages imposed by law." (R. 201)(emphasis in original). In turn, the District Court held, "[i]f there is no coverage, it follows that there can be no legal obligation to indemnify because there would be no legal obligation to pay." (*Id.*)

ICRMP's argument, however, suggests that ICRMP had unilateral authority to elect to defend under its own policy and bind Northfield to coverage under the Northfield policy. However, a duty to defend arises not under the Northfield policy (which is a reimbursement policy), but rather the ICRMP policy, a primary liability policy. (R. 219, Exh. 11, Counsel Aff., Exhibit I). ICRMP is an insurer, with its own policy, and its own duties ancillary to such policy. *See* Exterovich v. City of Kellogg, 139 Idaho 439, 441, 80 P.3d 1040, 1042 (2003)("A liability insurer such as ICRMP has two duties: the duty to defend, and the duty to indemnify."). No actions or decisions taken by ICRMP relevant to its own policy issued to Kootenai County have any bearing on questions of coverage under the Northfield policy. ICRMP's assumption, however, is that its initial determination of the duty to defend under its own policy extends out to a determination of coverage under the Northfield policy, and suggests that Northfield should have objected at the outset of the litigation as to coverage.

To the contrary, ICRMP's policy carries a $150,000 self-insured retention (SIR). Moreover, until ICRMP advises Northfield that its SIR has been exhausted (which ICRMP did not do until June 27, 2006, after it had already exceeded its SIR layer by $273,305.33 (R. 67-

69.)), Northfield has no duty to reimburse, nor even any "duty to speak" with respect to its own policy, a principle recognized in the analogous excess insurer context. *See, e.g.,* All City Ins. Co. v. Sioukas, 378 N.Y.S.2d 711 (N.Y. A.D. 1976)("And since it did not have a policy affording coverage to the respondent until the primary coverage had been exhausted, it had no duty to serve a notice of disclaimer upon the respondent or upon his highly experienced attorneys."); St. Paul Fire Ins. Co. v. Children's Hosp. Nat'l Medical Center, 670 F. Supp. 393, 402 (D.D.C. 1987)("The issue here, however, is whether St. Paul had a duty to disclaim coverage or reserve rights under the excess policies at the time it assumed the defense of the Lee claims under the primary policy, or at some other time prior to judgment. We conclude that, prior to the time the verdict was rendered, St. Paul had no such duty to speak with respect to the excess policies."); Richmond, "Rights and Responsibilities of Excess Carriers," 78 Denver Univ. L.R. 29, 44-45 (2000) ("An excess carrier typically has no duty to defend its insured until the limits of underlying coverage are exhausted . . . the majority position also makes sense because an insurer's duty to defend is expressly contractual, and if there is no policy language requiring an insurer to defend, there can be no duty to do so."). In fact, ICRMP's July 27, 2006 correspondence to Northfield even recognizes this: "To date, the defense costs incurred in the *Paradis* litigation total $423,305.33. Because the SIR has been exhausted, Northland's obligation to reimburse ICRMP for defense costs exceeding the SIR **has now arisen**." (R. 67.)(emphasis added). Northfield denied the claim shortly thereafter, on July 20, 2006.[4] (R. 71).

B. The Northfield Policy Is Not Reinsurance And Coverage—And Coverage Under It Must First Exist For ICRMP To Be Entitled To Reimbursement.

As an alternative argument, ICRMP turns to the assertion that the Northfield policy is reinsurance, for the proposition that a finding of coverage as a decision to defend under its own

[4] Northfield had also pre-emptively denied coverage, prior to notice of the SIR exhaustion, on February 13, 2006 (R. 55-58) and March 15, 2006 (R. 64-65).

policy binds Northfield.[5] Importantly, however, reinsurance policies are typically identified by the presence of "follow form" and/or "follow the fortune" provisions.[6] *See, e.g.,* North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1199-1200 (3rd Cir. 1995). In the present case, however, the Northfield policy at issue lacks any follow-the-form or follow-the-fortune provisions, as discussed herein. Lacking these hallmarks, the Northfield policy cannot be considered reinsurance, and instead is more correctly characterized as a "secondary assurance policy," rather than 'reinsurance.' Northfield Ins. Co. v. Montana Ass'n of Counties, 10 P.3d 813, 814 (Mont. 2000)(analyzing a Northfield Public Entities All Lines Aggregate Insurance Policy).

First, the Northfield policy does not have a follow-the-form provision. "A 'following form' clause in a policy of reinsurance incorporates by reference all the terms and conditions of the reinsured policy, except to the extent that the reinsurance contract by its own terms specifically defines the scope of coverage differently, i.e., via an exclusion." Aetna Casualty and Surety Company v. Home Ins. Co., 882 F. Supp. 1328, 1345 (S.D.N.Y. 1995); *accord,* North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1199 (3rd 1995). As explained by the Aetna court, the goal of a follow form is to achieve "concurrency of coverage" between the

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[5] The District Court declined to rule on whether or not the Northfield policy was reinsurance, finding that Northfield did not specifically raise that issue in its summary judgment motion. (R. 201-202.)

[6] For purposes of comparison, defendant refers this Court to the reinsurance issued by SCOR to ICRMP, with coverage commencing October 1, 2002. (R. 220, Exh. 11, Farley Aff., Exhibit CC). Note that the SCOR policy lacks the CGL-type language that is included in both the ICRMP and Northfield policies. Compare id. with id., Exh. I & R. 220, Exh. 10, Martens Aff., Exh. A. Rather, the SCOR policy only agrees to "indemnify the Program, as set forth in the Limits and Retention, Article 4, in respect of the liability which may attach to the Program under all policies, bonds, binders, certificates, contracts of insurance or reinsurance, co-insurance or co-indemnity, or other evidences of liability[.]" R. 220, Exh. 11, Counsel Aff., Exhibit CC, p. 1. Moreover, the SCOR policy includes explicit 'following' language: "The liability of the Reinsurers shall follow that of the Program in every case. . . [t]he Reinsurers agree to abide by the loss settlements of the Program, such settlements to be construed as satisfactory proof of loss[.]" Id. at pp. 2, 8.

original policy and the reinsurance policy: *Id.* at 1345. In the present case, however, the Northfield policy lacks any 'follow-the-form' language. (R. 220, Exh. 10, Martens Aff., Exh. A.) Additionally, there is no mention of any ICRMP policy anywhere within the Northfield policy. *Id.* To the contrary, similarities in comprehensive general liability and/or errors and omissions language between the two policies only highlights Northfield's position: that its policy is not reinsurance nor intended to be so, but rather is a stand-alone policy, utilizing standard insurance policy terminology and structure.

Second, the Northfield policy does not have a follow-the-fortunes provision, nor can one be imputed to the Northfield policy. Similar to follow-the-form terms are provisions knows as "follow-the-fortunes", or "follow-the-settlement," provisions. These provisions will typically incorporate language similar to: "All claims involving this reinsurance, when settled by [Commercial Union], shall be binding on [Swiss Re], which shall be bound to pay its proportion of such settlements promptly following receipt of proof of loss." Commercial Union Ins. Co. v. Swiss Reinsurance America, 413 F.3d 121, 124 (1st Cir. 2005). "Generally, when an insurer loses – or settles – an underlying coverage dispute, 'follow the fortunes' makes the payment to the insured binding on the reinsurer." North River Ins. Co, 52 F.3d at 1205. In the present case, Northfield's policy lacks any follow-the-fortunes provision. Moreover, no follow-the fortunes provision can be imputed to the Northfield policy. Michigan Tp. Participating Plan v. Federal Ins. Co., 592 N.W.2d 760, 764-65 (Mich. App. 1999)("[In Michigan Millers Mut. Ins. Co. v. North American Reinsurance Corp., 452 N.W.2d 841 (Mich. App. 1990)], our Court pointed to 19 Couch, Insurance, 2d, § 80.66, pp. 673-674, to emphasize that '[t]he **extent of the liability of the reinsurer is determined by the language of the reinsurance contract**, and the reinsurer cannot be held liable beyond the terms of its contract merely because the original insurer has sustained a loss.'")(emphasis added). This is also consistent with Idaho law, which holds that

"[w]here policy language is found to be unambiguous, the Court is to construe the policy as written, 'and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability.'" Purvis v. Progressive Cas. Ins. Co., 142 Idaho 213, ___, 127 P.3d 116, 119 (2005).

Importantly, although ICRMP contends that the policies are "similar" enough to argue that the Northfield policy is reinsurance, it ignores the function and form of the policies. The two policies are not the same, nor are they for the same purpose. ICRMP's first party liability insurance issued to the County is for the direct benefit and protection of the County against defense costs and potential liability of the County in civil cases so far is as relevant here. Northland's policy does not provide first party liability coverage to the County. Northland's policy insures ICRMP and is only called upon to reimburse or indemnify ICRMP if there is coverage under the Northland policy's terms for a sum of money, including defense costs, ICRMP was required to pay in excess of its self insured retention. The insuring language of both policies, so far as is pertinent to the issues here, is set forth below:

ICRMP Policy Issued to Kootenai County	**Northland Policy Issued to ICRMP**
Section II – Comprehensive General Liability Insurance **Comprehensive General Liability Insuring Agreements.** **Coverage A. Comprehensive General Liability.** We agree, subject to the terms and conditions of this coverage, to pay on your behalf those sums which you become legally obligated to pay as damages for personal injury or property damage which arise out of an occurrence during the policy	**Section II – Comprehensive General Liability.** **Insuring Agreements.** This section applies only to bodily injury, personal injury or property damage which occurred during the policy period and arise out of an occurrence which takes place within the territorial scope of the policy. **A – Comprehensive General Liability:** Underwriters hereby agree, subject to the

ICRMP Policy Issued to Kootenai County	Northland Policy Issued to ICRMP
period. * * * * **Coverage C. Law Enforcement Liability.** We agree, subject to the terms and conditions of this coverage, to pay on your behalf all sums which you become legally obligated to pay by reason of errors, omissions, or negligent acts arising out of the performance of your duties while providing law enforcement services or the administration of first aid resulting in personal injury or property damage during the policy period. **Definitions Applicable to Comprehensive General Liability Insuring Agreements.** **1. "Accident"** means an unexpected happening without intention or design. **8. "Occurrence"** means an **accident** or a continuous or repeated exposure to conditions which result in personal injury or property damage during the policy period. All personal injuries to one or more persons and/or property damage arising out of an accident or a continuous or repeated exposure to conditions shall be deemed one occurrence. * * * * **(R. 219, Exh. 2, McHenry Aff., Exh. 1, p. 14.)** **General Conditions.** Unless otherwise stated, the following conditions are applicable to ALL sections of this policy. **9. Defense of Claims or Suit.** We may investigate or settle any claim or suit against you, following review and consultation with you. We will provide a	limitations, terms and conditions hereunder mentioned, to indemnify the assured for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the assured shall become legally obligated to pay as damages imposed by because of bodily injury, property damage, personal injury, advertising injury, products liability and/or completed operations, host/liquor liability or incidental malpractice which result from an occurrence and which occur during the policy period. **C – Law Enforcement Liability**: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the assured for all sums which the assured shall be obligated to pay by reason of errors, omissions or negligent acts arising out of the performance of the assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of personal injury, bodily injury, property damage, violation of civil rights or first aid, happening during the period of this insurance except as covered under Sections II A and B. Notwithstanding insuring agreements A, B and C above underwriter shall not be liable to indemnify the assured for any sum which the assured shall be obligated to pay if a judgment or final adjudication in any action brought against the assured shall be based on a determination that acts of fraud or dishonesty were committed by the assured. * * * * **(R. 220, Exh. 9, Martens Aff., Exh. A, p. 13 of 43.)** **III. General Definitions.** The following words have specific meanings under various sections of the policy.

ICRMP Policy Issued to Kootenai County	Northland Policy Issued to ICRMP
defense with counsel of our choice, at our expense, if you are sued for a covered claim. Our obligation to defend any claim or suit ends when the amount we pay equals the limits of coverage afforded under this policy, plus accrued costs of defense. **(*Id.*, Exh. 1, p. 2.)**	OCCURRENCE. Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period. All personal injuries to one or more persons and/or property damage arising from an accident or happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence. **(*Id.*, Martens Aff., Exh. A, p. 6 of 43.)**

Clearly, there are significant differences in the two policies' coverage language. ICRMP's policy insuring Kootenai County, like traditional first party liability insurance, contains a duty to defend clause. The Northland policy does not. As can be easily seen, the insuring language for comprehensive general liability coverage and law enforcement liability coverage in the two policies is significantly different. The two policies' definitions of "occurrence" are different. Law enforcement coverage under the Northland policy is "occurrence" based as well, whereas no such language is contained in the ICRMP policy for such coverage. Consequently, whether ICRMP had a duty to defend Kootenai County and its employees, either by its own analysis or a judicial declaration, is not in any way dispositive of whether the facts and allegations in the *Paradis* suit arise from an "occurrence" covered by the Northland policy. It is clear that under Idaho law, coverage under Northland's insurance policy is to be determined by its clear, plain and unambiguous language or settled meaning, and not by the language of the ICRMP policy insuring the County or whether ICRMP did or did not have a duty to defend Kootenai County.

Finally, ICRMP contends – with little explanation – that the Northfield policy should be deemed to be ambiguous. ICRMP identifies a single instance in the Northfield policy where the word "Reinsured" is used, in an introductory passage. Appellant's Brief at 8. From this, plaintiff apparently asserts that an ambiguity has arisen, requiring the entire insurance contract to be construed in ICRMP's favor, despite the fact that the Northfield policy has no follow-the-form provision, and no follow-the-fortunes provision. This is a nonsensical reading of the policy, and disregards Idaho law. *See, e.g.,* Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005) ("In construing an insurance policy, the Court must look to the plain meaning of the words to determine if there are any ambiguities. This determination is a question of law. In resolving this question of law, the Court must construe the policy "**as a whole, not by an isolated phrase.**") (emphasis added).

In fact, in examining coverage, the District Court expressly held that: "Here, the Northfield policy is clearly an occurrence policy based on the unambiguous language and the applicable policy provisions, considered in their entirety. No ambiguity exists in the policy language and it is clear that only acts done while the policies were in effect were covered." (R. 197.) Thus, ICRMP has proposed an almost complete evisceration of the terms of the Northfield policy, not even by focusing on a single isolated phrase, but rather on a single isolated word. Such a result is patently absurd, and this Court should reject ICRMP's argument.

C. ICRMP's Election to Defend Does Not Impact the District Court's Analysis of the Existence of Coverage under the Northfield Policy. The District Court Properly Analyzed Whether There Was An Occurrence During the Northfield Policy Period.

The second error asserted by ICRMP is that the District Court failed to apply the correct legal standard for the duty to defend, in finding that there was no occurrence such as to trigger coverage under the Northfield policy.

Again, ICRMP attempts to blur the distinction between its own duty to defend (which it could certainly undertake even on a voluntary basis), and Northfield's right to determine coverage under its own policy. The decision of the District Court – as quoted by ICRMP – was not an analysis of the duty to defend under the ICRMP policy, but rather whether or not an 'occurrence' arose such as to implicate coverage (to wit, reimbursement) under the Northfield policy. (R. 195)(Heading: "'Occurrence' Under the Northfield Policy"). ICRMP may very well believe that it had a duty to defend the Kootenai County insureds; however, Northfield contested that, under its own policy, no 'occurrence' had triggered its reimbursement obligations. This is the issue, in fact, that the District Court ruled on: "As such, the Court finds that no coverage exists for ICRMP **under the Northfield policy** because there was no occurrence during the policy period." (R. 200.) No discussion of the duty to defend is salient in analyzing coverage under the Northfield policy, because the duty to defend does not relate to the reimbursement coverage afforded by the Northfield policy. Thus, the District Court did not commit error in failing to conduct a duty to defend analysis with respect to ICRMP's asserted obligations to its own insureds, the Kootenai County defendants.

ICRMP also asserts that the District Court improperly made a factual finding, that "only one proximate cause could exist for the wrongful imprisonment of Mr. Paradis and the subsequent emotional distress he allegedly suffered." Appellant's Brief at 20. More correctly, the District Court was applying the law governing the application of 'occurrence' over multiple-year claims and damages, given the allegations of the *Paradis* complaint. This was not a determination of a disputed fact, but a determination of the crux of the *Paradis* complaint to determine the sourcewaters from which the claims and damages alleged by Mr. Paradis originated. Indeed, ICRMP concedes that "the *Paradis* complaint alleged ongoing tortuous [sic] activity which began when Paradis was initially arrested and continued for the next 20 years

while he was incarcerated." Appellant's Brief at 21. The District Court correctly identified the nature of the Paradis complaint (damages and claims accruing for 20 years arising from the Kootenai County defendants *Brady* violation and subsequent arrest, trial and imprisonment):

> In order for the Court to establish whether there was an occurrence within the policy period, as such, the Court must first, identify the occurrence and then, determine when it took place. Generally, an occurrence is determined by the cause or causes of the tortious conduct. That is, the Court is to determine if there was "but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd Cir. 1982)(citations omitted). In applying this test, the Court finds that there was only one proximate cause for the wrongful imprisonment of Mr. Paradis and the damages that resulted from it; the failure to make the *Brady* disclosures and therefore, the failure to train properly regarding the *Brady disclosures*. It was this failure that caused the errors that led to the wrongful imprisonment in Idaho and the resulting infliction of emotional distress claims. Had the *Brady* training occurred, the exculpatory evidence should have been disclosed preventing the imprisonment of Mr. Paradis in Idaho and accordingly, his emotional distress claims. For that reason, the Court views the occurrence as being the failure to train regarding *Brady* requirements.

(R. 198.) In doing so, the Court relied on two key decisions: Kootenai County v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988), and the Third Circuit decision cited therein, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3rd Cir. 1982). Both stand for the proposition that an event occurring prior to the commencement of coverage will not be covered under a policy of liability insurance, irrespective of later damages and claims that may continue to accrue.

In Western Cas., a county sheriff, acting upon a writ of execution, conducted an execution sale of property. However, in doing so, the sheriff failed to act in accord with the statutory notice periods, subjecting him to civil penalties payable to the aggrieved party. Following the six month redemption period, the sheriff issued the deed to the subject property to the purchasers, as required by statute. During the redemption period, however, Kootenai County purchased an occurrence policy of liability insurance from Lloyd's and attempted to claim coverage, asserting that the delivery of the deed, in conjunction with the earlier failure to notify

in relation to the sale, constituted an occurrence under the policy. However, the Idaho Supreme Court rejected this argument and found no coverage under the Lloyd's policy, noting that the key wrongful act was the improperly conducted sale:

> The improper execution sale is not an event covered by the Lloyd's policy since it occurred almost six months prior to the effective date of the policy. An insurer is not liable "for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though **damages and claims** continued to accrue from this cause during the later period of coverage."

113 Idaho at 915 (quoting Appalachian Ins. Co. v. Liberty Mutual Ins. Corp., 507 F. Supp. 59, 62 (W.D. Pa. 1981), aff'd 676 F.2d 56 (3rd Cir. 1982))(emphasis added).

In Appalachian, an employer (Liberty Mutual) formulated certain job classifications in 1965, which ultimately gave rise to an EEOC complaint in 1971. Settlement was reached in the amount of $5,500,000, and Liberty Mutual sought coverage from its insurer, Appalachian, which had issued a policy for the policy year 1971. The Third Circuit refused to impose liability on Appalachian, finding that "it is the cause of the loss, and not the resulting injury that determines the incidents of liability under such policy." 507 F. Supp. at 62. The Third Circuit also summarized a critical point in analyzing what occurrence-based insurance is intended to provide coverage for: "Basically, the 'claims made' policy would provide unlimited retroactive coverage and no prospective coverage at all, while the 'occurrence' policy would provide unlimited prospective coverage and no retroactive coverage at all." *Id.* at 61.

In applying these cases, the District Court correctly identified the initial occurrence – the failure to train as to the *Brady* requirements, and related failure to make mandatory *Brady* disclosures. This critical event is what gave rise to the *Paradis* litigation, and forms the lens through which coverage under the Northfield policy must be analyzed. The District Court correctly analyzed the allegations at issue to identify this touchstone allegation, and its application of Western Cas. and Appalachian thereto was not in error.

D. The Allegations in the *Paradis* Complaint Do Not Implicate Coverage Under the Northfield Policy.

ICRMP next assigns error to the assertion that the District Court failed to find coverage under the Northfield policy via extrapolation of the duty to defend under the ICRMP policy. Plaintiff postures this as a two-prong argument: first, that the Court should have found ICRMP's partial summary judgment as determinative of coverage under the Northfield policy; second, that the specific allegations in the *Paradis* complaints implicated a duty to defend under the ICRMP policy (and, in turn, coverage under the Northfield policy). As discussed above, the District Court correctly held that there was no 'occurrence' under the Northfield policy (because the occurrence arose prior to the inception of the Northfield policy period); in any event, no coverage is implicated by the *Paradis* complaints, and ICRMP's two arguments fail.

As noted by ICRMP, the District Court did issue an initial order granting partial summary judgment to the Kootenai County insured, stating that: "ICRMP was obligated, pursuant to the policy of insurance it sold to Kootenai County, to provide a defense to its insureds for the lawsuit filed by Donald Paradis[.]" (R. 187-88.) Of course, this order is absolutely silent as to the Northfield policy at issue in the litigation. Recognizing this, ICRMP argues that the Northfield insuring language then requires reimbursement of defense costs: "The policy requires Northfield to indemnify its 'assured', ICRMP, for claims which ICRMP becomes 'legally obligated to pay' because of bodily injury', or 'personal injury' caused by an occurrence which occurs during the policy period." Appellant's Brief at 22. This argument ignores critical language in the Northfield policy, which mandates analysis under the Northfield policy's own terms:

> **Section II – Comprehensive General Liability.**
>
> **Insuring Agreements.**
>
> This section applies only to bodily injury, personal injury or property damage **which occurred during the policy period** and arise out of an occurrence which takes place within the territorial scope of the policy.

A – Comprehensive General Liability:

Underwriters hereby agree, **subject to the limitations, terms and conditions hereunder mentioned**, to indemnify the assured for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the assured shall become legally obligated to pay as damages imposed by because of bodily injury, property damage, personal injury, advertising injury, products liability and/or completed operations, host/liquor liability or incidental malpractice **which result from an occurrence and which occur during the policy period.**

C – Law Enforcement Liability:

Underwriters hereby agree, **subject to the limitations, terms and conditions hereunder mentioned**, to indemnify the assured for all sums which the assured shall be obligated to pay by reason of errors, omissions or negligent acts arising out of the performance of the assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of personal injury, bodily injury, property damage, violation of civil rights or first aid, **happening during the period of this insurance except as covered under Sections II A and B.**

(R. 220, Exh. 9, Martens Aff., Exhibit A (emphases added)). Thus, coverage under the Northfield policy must be examined upon its own terms, which are different than ICRMP's. For example, with respect to the definition of "occurrence" under Section II coverage, the ICRMP policy provides, in relevant part, that:

> All personal injuries to one or more persons and/or property damage arising out of **an accident or a continuous or repeated exposure to conditions** shall be deemed one occurrence.

(R. 220, Exh. 11, Counsel Aff., Exh. I, at p. 14 (emphasis added).) The Northfield "single occurrence" provision, however, incorporates *more* than just "accidents" and "continuous or repeated exposure to conditions":

> All personal injuries to one or more persons and/or property damage arising out of an accident **or a happening or event** or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

(R. 220, Exh. 9, Martens Aff., Exh. A, at p. 6 (emphasis added)). Thus, the Northfield policy would cut a broader swath in consolidating claims arising from a common nucleus (be it

accident, happening, event, or exposure to conditions) that would then be reduced to a single occurrence – coverage for which must occur within the policy period. As discussed above, the District Court correctly held that there was no 'occurrence' under the Northfield policy.

Turning to the other prong of ICRMP's argument, a count-by-count recap of the various claims in the initial complaint and amended complaint in *Paradis* – and application of the Northfield policy – is warranted.

Based on ICRMP's own analysis of its own policy with respect to the initial Paradis Complaint (R. 220, Exh. 11, Counsel Aff, Exh. E), ICRMP provided a defense to all of the defendants (except Dr. Brady, who was not employed by Kootenai County). However, the claims are not covered by the Northfield policy:

- Counts One and Two against Kootenai County and Walker are not covered, as they are civil rights claims wherein the alleged wrongful acts – failure to train – resulted in Mr. Paradis' incarceration in 1981, almost twenty years prior to the commencement of coverage under the Northfield policy. *See, e.g.,* Western Cas., 113 Idaho at 915; North River Ins. Co., 428 F. Supp. 2d at 1288-92. Additionally, Count II explicitly only alleges acts in 1980 and 1981.

  Counts Four, Five, and Six against all defendants for "negligence, false arrest, malicious prosecution, and false imprisonment" are not covered, as the claims allege either intentional acts, or simply reiterate Walker's alleged negligent failure to train (as also per Counts One and Two). With respect to the claim of negligence against Walker, that claim is not covered for the same reasons as Counts One and Two (*see* ¶88, incorporating the allegations of Counts One and Two). With respect to the other claims, these allegations claim acts that allegedly occurred during or before the trial of Mr. Paradis, who was convicted in December 1981, predating Northfield's coverage period. Additionally, all of the acts alleged are intentional in nature, which would be excluded from coverage by Exclusion A of Section II ("personal injury or property damage which the Assured intended or expected or reasonably could have expected" where 'personal injury' explicitly includes "Malicious Prosecution . . . False Arrest, [and] False Imprisonment"). (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.[7])

[7] Moreover, as later noted by the Paradis court, Idaho has a general rule precluding state law civil claims for perjury or falsification of evidence. Counsel Aff., Exh. F, at p. 65 (citing Anderton v. Herrington, 741 P.2d 360 (Ct. App. 1987)).

Count Six against defendants Haws, Elliott, Walker and Erbland is not covered by the Northfield Policy, as the acts complained of predate December 1981 and also allege intentional acts. Paradis' complaint alleged a conspiracy to "concoct evidence against Paradis and present it as if fact" (¶90). These claims both only refer to acts prior to and during trial (again, Mr. Paradis was convicted on December 10, 1981), and refers strictly to the intentional acts of Haws, Walker, Elliott, and Erbland, which claims would be from coverage by Exclusion A of Section II ("personal injury or property damage which the Assured intended or expected or reasonably could have expected"). (R. 220, Exh. 9, Martens Aff., Exh. A, p. 16.)

- Counts Seven and Eight against Dr. Brady are not covered, as ICRMP did not defend Dr. Brady, so no claim of reimbursement arises.

- Counts Nine, Ten, and Eleven against Haws are not covered, as the claims allege negligent and intentional infliction of emotional distress pre-dating Paradis' conviction or which continued thereafter. Again, the "occurrence" or event was the failure to disclose by Haws prior to conviction in 1981 and, consequently, any continuation of that event is the same prior occurrence, and defamation. These claims are excluded from Section II coverage, by Exclusion A of Section II ("personal injury or property damage which the Assured intended or expected or reasonably could have expected", where 'personal injury' is stated to include "Mental Anguish" and "Defamation of Character"). (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) Moreover, Haws left the employment of Kootenai County in 1983, and acts alleged after that date would not have occurred while acting as an employee of the county. (R. 220, Exh. 11, Counsel Aff., Exh. DD, at ll. 121:5-7; Counsel Aff., Exh. E, ¶113.)

Thus, for defense costs incurred by ICRMP prior to Paradis' First Amended Complaint (June 6, 2005) Northfield has no obligation to reimburse such costs under Section II of the Northfield Comprehensive General Liability coverage.

Following the initial order of the *Paradis* court dismissing some claims, Mr. Paradis filed his First Amended Complaint (R. 220, Exh. 11, Counsel Aff., Exh. D), which ICRMP provided a defense for (with the exception of Dr. Brady). Again, however, the claims posed are not covered by the Northfield policy:

- Counts I, II, and III against Walker and Kootenai County are not covered, as they are §1983 claims (discussed above) wherein the alleged wrongful acts – failure to train – resulted in Mr. Paradis' incarceration in 1981, almost twenty years prior to

the commencement of coverage under the Northfield policy.[8] *See, e.g.,* Western Cas., 113 Idaho at 915; North River Ins. Co., 428 F. Supp. 2d at 1288-92. Additionally, Counts II and III explicitly only allege acts in 1980 and 1981 (pp. 20-25); even ICRMP did not consider these claims covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.)

- Count IV against Elliott is not covered, as it, too, is an uncovered §1983 claim relating to Mr. Paradis' 1981 conviction. Further, with a malicious prosecution claim, coverage under an insurance policy is instead triggered when damage begins to accrue – that is, with malicious prosecution, almost immediately. *See* Muller Fuel Oil Co. v. Insurance Co. of North America, 232 A.2d 168, 175 (N.J. Super. 1967)("In a claim based on malicious prosecution the damage begins to flow from the very commencement of the tortious conduct-the making of the criminal complaint."). Muller has been favorably cited in Idaho. *See* National Aviation Underwriters, Inc. v. Idaho Aviation Center, 96 Idaho 663, 670, 471 P.2d 55, 57 (1970) ("It is well settled that the time of the occurrence of an 'accident,' within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged."). Finally, the allegations discuss intentional acts by Elliott, which would be excluded from coverage by Exclusion A of Section II ("personal injury or property damage which the Assured intended or expected or reasonably could have expected" where 'personal injury' explicitly includes "Malicious Prosecution"). (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) Again, Kootenai County did not consider this claim covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.)

- Count V against all of the defendants is not covered, as the First Amended Complaint references that the wrongful act under §1983 – the conspiracy – occurred "pre-arrest," which would have occurred in 1980 (November 26, 1980 - ¶59), well outside of the coverage provisions. Further, as a conspiracy to which intent was alleged (pp. 27-29), the intentional act exclusion would also apply. (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) Kootenai County did not consider this claim covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.[9])

- Count VI against Elliott is not covered, as it is a §1983 claim for fraudulent procurement of an arrest warrant, alleging acts prior to and during Mr. Paradis' preliminary hearing (December 1980) and the motion to dismiss on jurisdictional grounds (April 1981). (¶66.) As such, these claims did not "occur" within the Northfield policy's coverage period. Additionally, as framed in the Paradis First Amended Complaint, the acts complained of are intentional in nature, such that

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[8] Additionally, Mr. Walker left office as Prosecuting Attorney in 1988. (R. 220, Exh. 11, Counsel Aff., Exh. EE, at ll. 56:5-24.)

[9] Haws left the employment of Kootenai County in 1983 (R. 220, Exh. 11, Counsel Aff, Exh. DD, at ll. 121:5-7); Erbland left the employment of Kootenai County in 1987 (*Id.*, Exh. FF, at ll. 10:6-8); and Elliott retired in 1988 (*Id.*, Exh. GG, at ll. 8:8-13).

the intentional act exclusion applies to bar coverage. (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) Kootenai County did not consider this claim covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.)

- Count VII against defendants Kootenai County and Walker simply incorporates Counts I, II, and III, and restates them as a state claim for failure to train/supervise. (¶¶152-159.) For the same reasons that bar coverage for Counts I, II, and III, coverage is also barred here, as any damage to Paradis arising from the failure to train/supervise commenced at least at the time of the probable cause hearing (June 25, 1980), and, at latest, at the time of his conviction (December 10, 1981). Kootenai County did not consider this claim covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.)

- Count VIII against Brady was not defended by the County. (R. 220, Exh. 9, Martens Aff., Exh. C & Exh. 11, Counsel Aff., Exh. R.)

- Count IX against Haws and Brady is not covered, as Brady was not defended by the County. (R. 220, Exh. 11, Counsel Aff., Exh. R.) With respect to defendant Haws, Paradis alleged that "[o]n diverse occasions after the conviction of Plaintiff-Paradis, up to and including the time of his release upon habeas corpus, Defendant-Haws and Brady made statements about Plaintiff-Paradis that placed him in a false light," and that "[t]hese statements by Haws took place on or about 1986 and 1987 and continued after Plaintiff-Paradis' release from prison." (¶¶171 & 174.) The Northfield policy excludes coverage for personal injury damages that are intended or reasonably expected, where personal injury is defined, in relevant part, to include "Invasion of Rights of Privacy, Libel, Slander or Defamation of Character," which would preclude coverage for this claim under the Northfield policy. (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) However, Mr. Haws left the employment of Kootenai County in 1983; ICRMP did not deem this claim covered for that reason. (R. 220, Exh. 11, Counsel Aff., Exh. R & DD, at ll. 121:5-7.)

- Count X against defendant Haws is not covered, for the reasons previously discussed; to wit, the §1983 claim was triggered for insurance purposes at the time the event giving rise to the harm occurred. Western Cas., 113 Idaho at 915. Additionally, the claim for intentional infliction of emotional distress is precluded from coverage by the intentional acts exclusion. (R. 220, Exh. 9, Martens Aff., Exh. A, p. 14 & 16.) Further, Haws left the employment of Kootenai County in 1983. (R. 220, Exh. 11, Counsel Aff., Exh. DD, at ll. 121:5-7.)

- Count XI against defendants Elliott and Brady is not covered, as Brady was not defended by the County. (R. 220, Exh. 9, Martens Aff., Exh. C & Exh. 11, Counsel Aff., Exh. R.) Further, with respect to Elliott, Paradis' §1983 claim alleged that "Brady and Elliott conspired that Brady would not bring documents and tangible evidence to, or reveal documents and tangible evidence at, the trial of Plaintiff-Paradis, that would show that he was innocent of the crime with which he was charged." (¶200.) Thus, the conspiracy alleged would predate Paradis'

> conviction of December 10, 1981, thereby falling outside the coverage provided by the Northfield policy. Also, like Count V, as framed in the Paradis First Amended Complaint, the acts complained of are intentional in nature, such that the intentional act exclusion applies to bar coverage. (R. 220, Exh. 9, Martens Aff., Exh. A, pp. 14 & 16.) Kootenai County did not consider this claim covered. (R. 220, Exh. 11, Counsel Aff., Exh. R.)

Thus, for defense costs related to the Amended Complaint, Northfield has no obligation to reimburse such costs under Section II of the Northfield policy.

ICRMP specifically highlights two arguments in favor of coverage: first, that some torts were independent, and second, that some were continuing. Although Northland addresses each count above, it also addresses this particular arguments for the sake of completeness.

With respect to the argument for "independent" torts, ICRMP specifically cites to the allegations against Haws, and the allegation that "Haws made a series of false statements concerning him which began in 1986 and 1987 and continued until his release from prison." Appellant's Brief at 27. Even assuming *arguendo* that these acts are not claims arising from an original event and thereby not covered (as held by the District Court),[10] ICRMP ignores the fact that Mr. Haws left the employment of Kootenai County in 1983, obviously long prior to the issuance of the Northfield policy at issue, and even prior to the formation of ICRMP itself. R. 220, Exh. 11, Counsel Aff., Exh. DD, at ll. 121:5-7. Thus, if "independent torts", Mr. Haws would have done so when he was <u>not</u> an employee of Kootenai County, and thus, would not be an "Assured" under the Northfield Policy:

> It is agreed that the unqualified word 'Assured' wherever used in this Insurance includes not only the Named Assured but also:
>
> A. any official, trustee, Director, Officer, Partner, Volunteer or employee of the Named Assured while acting within the scope of his duties as such, and any

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[10] The District Court recognized that "ICRMP found that a duty to defend resulted only on three of the surviving claims, Count I (§ 1983: Failure to Train re: *Brady*) against Kootenai County; Count X(1) (Negligent Infliction of Emotional Distress) against Haws; and Count X(2) (Intentional Infliction of Emotional Distress) against Haws" (R.192.)

> person, organization, trustee or estate to whom the Named Assured is obligated by virtue of written contract or agreement to provide insurance such as is offered by this Insurance, but only in respect of operations by or on behalf of the Named Insured.

(R. 220, Exhibit 9, Martens Aff., Exh. A, p.5.) Thus, ICRMP's argument on this point fails.

ICRMP alternatively argues that some of the torts alleged are continuing in nature, and thus implicate the 2000-2001 Northfield policy year. Setting aside the fact that a number of the identified claims were even disavowed by ICRMP as covered (R. 220, Exhibit 11, Counsel Aff., Exh. R), ICRMP's proposed continuing tort analysis does not comport with insurance law nor the facts of this case. Plaintiff first relies on Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), wherein the court discussed the difficulty in identifying a trigger date in analyzing insurance coverage:

> The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal proximity to one another. In cases involving asbestos-related disease, **however, inhalation-the "occurrence" that causes the injury-takes place substantially before the manifestation of the ultimate injury-asbestosis, mesothelioma, or lung cancer.** Furthermore, although it is not known how little exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. **Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.**

667 F.2d at 1040 (emphases added). In the present case, no ambiguity in the key event exists; rather, the Kootenai County defendants failed to train on, and make, *Brady* disclosures, and Mr. Paradis was convicted in 1981 and subsequently imprisoned. Thus, Keene offers ICRMP no assistance.

ICRMP also relies upon Nat'l Cas. Ins. Co. v. City of Mt. Vernon, 515 N.Y.S.2d 267 (1987) with respect to a false imprisonment claim,[11] but disregards a key passage of the cited quote: "We note, however, that there is nothing in the policy which requires, as a prerequisite to ascertain whether there is coverage, that the injury resulting from a causative event be reduced to a single or fixed occurrence in time." *Id.* at 270. The Northfield policy, however, provides:

> For Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period. All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

(R. 220, Exh. 9, Martens Aff., Exh. A, p.6.) In a more recent decision to the contrary, the Southern District of Florida refused to find coverage for false imprisonment-type claims that arose 20 years prior to the inception of coverage under a policy where a claim was made simply based upon the exoneration date, as in the present case:

> It is undisputed that Messrs. Smith and Townsend were neither arrested nor incarcerated during the policy period. The question before the Court is whether the claims alleged in the Underlying Complaints occurred during the policy period. The defendants argue that the ongoing nature of the injuries to Messrs. Smith and Townsend, coupled with the fact that they were actually exonerated during the period of coverage triggers Plaintiff's duty to defend against the Underlying Complaints.

North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1288-89 (S.D. Fla. 2006). The court rejected this contention:

> In this case, it is clear that the damage "occurred" and manifested itself well before the Policy period. Years before the Policy was a glimmer in the Defendants' collective eye, Messrs. Lee and Townsend were allegedly wrongfully deprived of their liberty and falsely imprisoned – and any alleged malicious prosecution resulted in their imprisonment at that time. Not only would it strain logic to hold that a policy could be applied retroactively to activities undertaken

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[11] Paradis only alleged false imprisonment in his initial Complaint (as discussed above), and false imprisonment was not one of the three counts of the Amended Complaint that ICRMP believed it provided coverage for. (R. 220, Exh. 11, Counsel Aff., Exh. R).

> twenty years earlier, but as a matter of public policy, if this Court were to deny Plaintiff's motion, it would be imposing on Plaintiff a risk based on the fortuitous occasion of the date of exoneration as opposed to when the date when the damage first manifests itself, *i.e.* the date of incarceration. While North River has a duty to defend lawsuits against officers for malicious prosecution or false imprisonment claims occurring during the Policy period, it is inconceivable that the calculation of the premium that Broward County paid North River to purchase the Policy including an analysis of *any* earlier prosecutions in Broward County and the likelihood of malfeasance over the course of those prosecutions.

Id. at 1290 (emphasis in original; underlined emphasis supplied by defendant). After referencing Heck, the court went on to state:

> For the reasons stated above, the Court does not consider holding the trigger for the claims for which the Defendants seek coverage to be outside the policy period inconsistent with the Court's view that a constitutional claim that undermines a criminal conviction cannot be brought until the defendant's conviction is nullified.
>
> If, in this case, the Defendants were asserting coverage of constitutional claims (which they are not), those claims would be outside the policy period as well – although the statute of limitations on those claims may not have begun to run until Messrs. Lee and Townsend were in fact exonerated.
>
> . . .
>
> Thus, consistent with Florida law, the Court finds that the "bodily injury" and "personal injury" covered by Defendants' insurance from 1999 through 2002 cannot be invoked to cover allegations of malicious prosecution, false imprisonment and numerous allegations of negligence and civil rights violations that "occurred" twenty years earlier.

Id. at 1290 n.3 & 1292. Accordingly, the consummation of any alleged failure to provide *Brady* training – and the resultant damage, the commencement of Mr. Paradis' incarceration – occurred, at latest, in December 1981, which would thereby not be covered as an "occurrence" under the 2000-2001 or any earlier Northfield policy period, and the fact of exoneration during the 2000-2001 Northfield policy period does not result in coverage by Northfield. Reliance upon the April 10, 2001 date of Paradis' release fails, as there is a sharp distinction between claim accrual in the statute of limitations sense, and occurrence in the insurance sense:

> But these dates need not necessarily correspond. Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns. Statutes of limitation function to expedite litigation and discourage stale claims. *Bigansky v. Thomas Jefferson University Hosp.*, 442 Pa.Super. 69, 658 A.2d 423, 426 (1995). But when determining when a tort occurs for insurance purposes, courts have generally sought to protect the reasonable expectations of the parties to the insurance contract. *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir.1982).
>
> Because of this fundamental difference in purpose, courts have consistently rejected the idea they are bound by the statutes of limitation when seeking to determine when a tort occurs for insurance purposes. *See ACandS, Inc. v. Aetna Cas. and Sur. Co.*, 764 F.2d 968, 972 (3d Cir.1985) (statute of limitation cases "are not particularly relevant" to determining what event triggers insurance coverage); *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1043-44 (D.C.Cir.1981) (statute of limitation cases "are not at all relevant" and "have no bearing" in case seeking to determine when tort occurred for insurance purposes); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1220 (6th Cir.1980) (because of differences in underlying policies, statute of limitation cases not relevant to determining when asbestos-related tort occurs for insurance purposes); *Commercial Union Assurance Co. v. Zurich American Ins. Co.*, 471 F.Supp. 1011, 1015 (S.D.Ala.1979) ("cases dealing with the determination of the date or occurrence of a continuing injury or disease for the purpose of applying appropriate statute of limitations are not controlling for purposes of determining insurance coverage"); *Southern Maryland Agric. Ass'n v. Bituminous Cas. Corp.*, 539 F.Supp. 1295, 1302-03 (D.Md.1982) (date on which statute of limitation begins to run not determinative of date when tort of malicious prosecution occurs); *S. Freedman & Sons v. Hartford Fire Ins. Co.*, 396 A.2d 195, 198-99 (D.C.1978) (statute of limitation "provides little assistance" and "need not determine" when tort of malicious prosecution occurs).

City of Erie, Pennsylvania v. Guaranty Nat. Ins. Co., 109 F.2d 156,161-62 (3rd Cir. 1997). Thus, a continuing tort analysis, which may identify a later date for statute of limitations purposes, does not dictate the determination of "occurrence" in the insurance context.

Finally, ICRMP curiously relies upon Dioceses of Winona v. Interstate Fire & Casualty Co., 89 F.3d 1386 (8th Cir. 1996). While the facts of Dioceses is inapposite to the present matter (ongoing sexual abuse), application of Dioceses, in an event, would result in Northfield avoiding

coverage for the *Paradis* claims.[12] In Dioceses, the Eighth Circuit applied Minnesota law to find that the repeated sexual abuse of a child constituted "one continuing occurrence." *Id.* at 1391. In doing so, the court held that *multiple* insurers could be held responsible for policies covering certain portions of time during the 1979-1987 span of the abuse. *Id.* at 1395-96. In doing so, the Eighth Circuit went on to note:

> The parties agree that Mrozka's abuse began in October 1979 and continued until February 1987. Thus, it is undisputed that Mrozka suffered "actual injury" in all policy periods, triggering the coverage of all such policy periods. *See NSP,* 523 N.W.2d at 663.[FN11] We have determined, however, that there was no covered "occurrence" for purposes of insurance coverage for the Archdiocese after December 1980, thus, the only insurance coverage triggered are those in effect from October 1979 through December 1980: Aetna's through August 30, 1980, and Lloyd's and Interstate's commencing September 1, 1980.
>
> FN11. Furthermore, as we discussed in footnote 5, *supra,* the court in *NSP* also held that **in situations in which multiple policies involved where there was one continuous occurrence, the courts should apply one full SIR or limit to each separate policy period.** 523 N.W.2d at 664. Thus, under the rationale set forth in *NSP,* the Archdiocese must assume the retained limit with respect to each of the triggered policies.

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[12] Although plaintiff asserts that "[o]nce a policy is triggered, the insurers are jointly and several liable for the overall risk" (Appellant's Brief at n.3), Dioceses expressly stands for a contrary position – insurer liability based upon time "on the risk" – the application of which would avoid any potential collision between an insurer's need to sue other insurers to recover on a joint and several liability, and Idaho's general prohibition of third-party direct actions against insurers, even as between insurers. *See, e.g.*, Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho, 132 Idaho 318, 322 & n.2 , 971 P.2d 1142, 1146 (1998)(refusing insurer-v-insurer direct action in third party claim, and also distinguishing Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co., 127 Idaho 716, 95 P.2d 1025 (1995) as involving first-party coverage and remarking that direct action issue not raised, suggesting disapproval of even first-party coverage-related insurer-v-insurer direct actions). Note that beginning in June of 2003 until immediately prior to this litigation, ICRMP has sought reimbursement from multiple insurers for the *Paradis* claim. (R. 220, Exh. 11, Counsel Aff., Exhs. S-BB.)

E. Northland Has the Right to Contest Coverage of ICRMP's Settlement with Mr. Paradis.

In the final section of ICRMP's brief, ICRMP relies upon City of Idaho Falls v. Home Indemnity Co., 126 Idaho 604, 888 P.2d 383 (1995) for the proposition that Northland "cannot relitigate or challenge the settlement which was reached between ICRMP and Mr. Paradis." Appellant's Brief at 36. However, the day prior to the filing of appellant's brief, this Court further clarified the City of Idaho Falls decision on this particular point. *See* Deluna v. State Farm Fire and Casualty Co., 2008 WL 2586497 (Idaho, July 1, 2008).

In the Deluna matter, the insured was sued by a party (Ms. Deluna) claiming, among other causes of action, negligent transmission of herpes and negligent infliction of emotional distress. *Id.* at *1. The insured had tendered defense of the matter to State Farm, who refused to defend; the insured proceeded to defend the matter *pro se*. *Id.* at *2. The underlying matter proceeded to trial, where Ms. Deluna prevailed on the two aforementioned negligence claims, recovering a judgment of $1,282,596.32. *Id.* However, the insured had previously assigned his rights to indemnity under the State Farm policy, in return for a promise that Ms. Deluna would not recover against him. *Id.* Thus, the insured did not even appear for the trial of the matter. *Id.*

Ms. Deluna subsequently sued State Farm to recover on the judgment, and asserted, in part, that State Farm could not challenge coverage of the judgment under its policy, given that it had previously refused to defend. *Id.* In doing so, Ms. Deluna relied upon the City of Idaho Falls decision - as ICRMP does here - to argue that State Farm was now estopped from challenging the verdict or otherwise disputing its duty to indemnify. *Id.* at *4. This Court rejected that argument:

> *Hirst* concluded the duty to indemnify is triggered only where an insurance company would be obligated to pay the underlying action regardless of how it fulfilled its duty to defend. We agree.

> Deluna argues that an insurer, having breached its duty to defend, is not entitled to relitigate an underlying action following a settlement or judgment, citing the *City of Idaho Falls* case. 126 Idaho at 610, 888 P.2d at 389. However, in *Hirst,* the Court of Appeals correctly stated: "[W]here an insurance company has wrongfully refused to defend, it may nevertheless in a subsequent action on the policy attempt to show that the liability is not covered by the policy." 106 Idaho at 799, 683 P.2d at 447 (quoting *Afcan v. Mutual Fire, Marine and Inland Ins. Co.,* 595 P.2d 638, 647 (1979)). In *Afcan,* the Alaska Supreme Court was considering a situation where liability was imposed by a settlement agreement involving claims that fell both within and outside of the policy. The Court explained that an insurer would be liable up to policy limits if the claims fell within policy coverage, but would not be liable if the claims were outside policy coverage. *Afcan,* 895 P.2d at 647. In this case, State Farm is not attempting to relitigate the judgment in *Deluna v. Kramsky.* Instead, it attempts only to show that Deluna's claims fell outside Kramsky's business insurance policy and it is entitled to do so.

Id. In doing so, this Court reiterated its rejection of the so-called "Illinois Rule", wherein an insurer is estopped from denying coverage if it breaches its duty to defend. *Id.* Thus, ICRMP cannot find refuge in estoppel principles, and Northfield is entitled to challenge whether its policy affords coverage for the *Paradis* action; both the cost of defense incurred by ICRMP and that there is no coverage for the amount paid in settlement by ICRMP.

The central, if not the only, issue in this case is whether there is coverage under the Northfield policy and, more specifically, whether any of the underlying allegations and facts in the Paradis case constitute an occurrence, happening or event, which occurred during the period of the Northfield policy. Northfield clearly demonstrated, and the district court found, there was no occurrence and, therefore, no coverage of the sums ICRMP paid. Under the Northfield policy, no coverage means no obligation to reimburse for either defense costs or the amount paid in settlement. ICRMP's argument that Northfield must reimburse the amount of the settlement completely misses the point, under Idaho law as well as the language of the Northfield policy. Northfield did not breach a duty to defend because there is not duty to defend under the Northfield policy. Northfield did not breach its insurance contract with ICRMP and has no liability to ICRMP at all.

V. CONCLUSION

Accordingly, for the reasons stated above, the decision of the District Court granting summary judgment to Northfield should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of July, 2008.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of July, 2008, I caused to be served two (2) true and correct copies of the foregoing document by the method indicated below, and addressed to each of the following:

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